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CRITICAL NOTE.

The Madras and Southern Mahratta Railway Co., Ltd. v. *Jayammal,* (1924) 47 M. L. J. 887.

The decision in this case is unfortunate, not merely because of the sympathy one feels for the little plaintiff who has been maimed for life, but because we think that the learned Judges who set aside the decision of the Trial Judge (1) did so on an erroneous view of the law in relation to the facts of the case. In cases of negligence it is by no means easy to be guided correctly by precedents, for a circumstance more or less may make all the difference in arriving at a just conclusion as to the existence or otherwise of negligence, and differentiate one case from another to which at the first blush it may seem to bear a strong resemblance. The law in England has undergone much change in the manner of its treatment though not in the application of its fundamental principles. The old classification of injured persons into invitees, licensees and trespassers is daily assuming less prominence. It is very refreshing to find Mr. Justice Srinivasa Aiyangar apprehending this change in the following passage :—" It seems to me that the classification of the injured into trespassers, bare licensees, licensees, invitees, servants and so on has no more fundamental basis than the repeated application of this standard or measure (namely, proper care) to the varying circumstances under which the injured persons came to be at the particular place and at the particular time (2)." Again, he says :—" For the determination of these questions, the first thing to be considered is whether the plaintiff was at the time and place a trespasser or licensee. It is not, however, as if that the licensee as such has got any more rights so to say than a trespasser, but the question becomes of importance only with regard to the other

1. (1923) 45 M L J 545.

2. (1924) 47 M L J 896.

question, the main question in the case, whether or not the driving of the engine was negligent. For this purpose a trespasser is merely an unexpected visitor or, to put it a little more clearly, one whose visit to the place at the time and in the circumstances could not have been foreseen and provided for by a man of ordinary prudence. Similarly for this purpose the licensee is merely a person or a member of a class whose presence at the time and about the place should in the circumstances have been foreseen and provided for by a man of ordinary prudence (3)." It is this mode of dealing with the subject which for the first time was forcibly adopted by Lord Macnaghten in *Cooke's case* (4) that probably led Mr. Justice Coutts-Trotter, as he then was, to think that the law had undergone some change, and the learned Judges in the Court of Appeal are certainly right in pointing out that in substance *Cooke's case* (4) laid down no new law. Lord Macnaghten puts the proposition thus :—"The question for the consideration of the jury may, I think, be stated thus : Would not a private individual of common sense and ordinary intelligence placed in the position in which the Company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turn-table, and would he not have thought it his plain duty either to put a stop to the practice altogether or at least to take ordinary precautions to prevent such an accident as that which occurred ? (5) " All that the jury or the Judge has to consider, therefore, is whether the person charged with negligence knew of the likelihood of persons sustaining injuries from the combined effect of their own conduct and an act or omission on his part, and whether he adopted measures of precaution to prevent them.

It is, therefore, material to examine the knowledge of the parties and to see what measures of precaution were taken at the different stages of a transaction which has finally culminated in the injury to the plaintiff. It is here that the learned Judges in the Appellate Court have fallen into error, an error which was guarded against by the Trial Judge. A wicket-gate leads from one side of the station-yard to the other. The Company knew that this was being used by members of the

3. (1924) 47 M L J 897.
4. *Cooke* v. *Midland Great Western Railway of Ireland*, (1909) A C 229.
5. *Ibid.*, p. 234.

public as a short-cut, yet took no precautions to have it locked, or to prosecute the trespassers, or to keep a guard to warn persons intending to cross the lines of the danger of an approaching train or of the shunting operations. Here without more was the initial negligence of the Railway Company, and it is no answer to this part of the case that the child might just as well have slipped through the fence as suggested by the learned Officiating Chief Justice (6). Applying the test of Lord Macnaghten, the Company knew that people used the gate as a short-cut, but not that they slipped through the fence,—and would not an ordinary man with that knowledge have taken some precaution to prevent the accident happening? The position, we think, would have been precisely the same if children habitually slipped through the fence and crossed the lines, provided knowledge of that fact could be imputed to the Company.

But this initial negligence on the part of the Company does not necessarily make it liable for all accidents, for they might with that knowledge adopt other measures of precaution, or the accident might be due to the fault of the plaintiff himself. If these premises are correct, then the Company, with the knowledge that people were in the habit of crossing the line, ought to have kept a special look-out when shunting the engine which would have enabled the servants to stop the engine in time to prevent its running over the plaintiff. It is no answer to say that the fireman saw the plaintiff only when 5 ft. away,—too late to stop the engine. We think the Judges in the Court of Appeal misunderstood the Trial Judge when they assume him to mean that the engine could be stopped at that short distance. The negligence charged by the Trial Judge is the omission to keep a proper look-out which would have enabled the driver or the fireman to see the plaintiff from a distance long enough to stop the train. But the negligence of the Company does to stop here; when the child was actually seen from a distance of 5 ft., had the brakes been applied and the whistle blown, there is no reason to suppose that these precautions would not have attracted the attention of the child, who, it has been found, "must have been on the occasion either very absent-minded or her childlike nature so wholly absorbed in something else," and by retarding the motion of the engine, given her time to move away

6. (1924) 47 M L J 889.

from the imminent danger into which she was running. The case of *Smith* v. *Brown* (7) might be cited to advantage. The plaintiff almost deaf crossed the street diagonally at a place where there was no crossing. Defendant's driver saw the plaintiff for the first time a short distance off, and shouted a warning. The plaintiff, not hearing, continued on his course, whereupon the driver began to pull up, and shouted again, but immediately after collided with the plaintiff, and the defendant was held liable in negligence.

Here there was negligence on the part of the Company from the first to the last, and the only possible way of exonerating the Company is on the reasoning of the learned Officiating Chief Justice that, " Supposing the driver had seen the plaintiff coming from the wicket-gate towards the line, there was no reason for him to anticipate that she would attempt the very rash act of crossing in front of the engine (8). " We beg to differ from this conclusion. The driver would have seen the continued approach of the child with a load on her head, and her face practically turned away. This ought to have put him on guard either against the child being deaf or that " owing to the heedlessness of youth or the burden on her head " she was all unawares placing herself in a perilous situation. The rashness of youths dashing in front of cars is the experience of every driver on the Madras roads. Both the Trial Judge and Mr. Justice Srinivasa Aiyangar rightly (if we may say so) found that of the negligence of the Company there could be no doubt.

The question then is whether there was such contributory negligence on the part of the plaintiff as to disentitle her to any remedy against the Company. In considering this aspect of the case the learned Officiating Chief Justice allowed himself to be guided by a remark of Brett, M. R. in the case of *Davey* v. *L. and S. W. Ry. Co.* (9) to the effect that the burden lies on the plaintiff to prove both an affirmative and a negative ; that the accident was due solely to the negligence of the defendants and that the plaintiff did not in any way contribute to it. It is to be regretted that it was not brought to his Lordship's notice that Brett, M. R. (Lord Esher) was the only Judge in England who took that view, which was ex-

7. 28 L R Ir 1.

8. (1924) 47 M L J 892.

9. 12 Q B D 71.

pressly negatived by eminent Judges in the House of Lords (10). Before however considering this question of contributory negligence it might be well to examine the applicability of the various rulings relied on.

Much water has flown under the bridge since the decision in *Burchell* v. *Hickinson* (11). Cases of that class raise entirely different considerations, complicated as they are by the contractual relationship between landlord and tenant. *Jenkins* v. *Great Western Railway* (12) has no bearing on the present case as it turned wholly upon the finding of the jury that the Company had no knowledge that children were in the habit of trespassing on the railway line. Cozens-Hardy, M. R., says:— "Now, taking these findings most favourably to the plaintiff, it seems to me that they amount to this. The railway authorities must be taken to have known that children did get on to the stacks of timber, which were in fact adjacent to the fence ....and they must be taken to have given permission or leave and license to go there and get over the fence on to the stacks of timber, and to play there. But the jury negatived expressly that the railway authorities had any knowledge at all of any leave and license to any children to go on to the main line. That, I think, is the utmost extent to which the evidence and the findings go (13)." In the present case, the learned Judges found that the Company did know that people (including children) were habitually crossing the lines through the wicket-gate. In *Latham's case* (14) again, there was no finding that the defendants knew that the paving stones, the cause of the accident, involved any danger, or that children of tender years were in the habit of trespassing unattended. Hamilton L. J. says :—"The finding of the jury in the present case is confined to leave to come upon and to play upon the land. It is difficult to see how there could be any implied leave to play with the actual stones in question, for they had only just then been put down, and, equally whether the assumed leave was special or general, there was no evidence that the defendants knew of any danger connected with the stones or of any complaint or accident that might reasonably bring home to them the existence of such danger (15)." The case, moreover,

10. *See* the note at p. 510, Clerk and Lindsell on *Torts*, 7th Edn.

11. 50 L J Q B 101. See *Dobson* v. *Hoisley*, (1915) 1 K B 634 and cases discussed therein.

12. (1912) 1 K B 525.

13. *Ibid.*, p. 531.

14. (1912) 1 K B 398.

15. *Ibid.*, p. 418.

bears no resemblance to the present case. The defendant was not charged with any active negligence in that he set in motion any dangerous object as the engine without proper safeguards. In fact, nothing was known as to how the accident arose. If in the present case the plaintiff had tripped against one of the lines of rails and the negligence charged was the omission to lock the gate, the case would have been on all fours. The principles governing the present case were laid down by Cockburn, C. J. in *Gallagher* v. *Humphrey* (15a) where a licensee passing under a crane sustained injury by the working of a defective crane. His Lordship observes that though the licensee takes the license subject to existing dangers, he does not bargain for the added negligence in working a defective crane. In fact, the learned Judges seem to have attached too much importance to what we have called the initial negligence and too little to what followed. In *Singleton* v. *The Eastern Counties* (16) the decision turned entirely on the absence of any allegation or proof of a single negligent omission to be imputed to the Company. It only laid down that because a child was hurt on a railway line there arose no presumption that it must have been due to the negligence of the Company.

The only cases relied on which seem to us to countenance the views of the Court are *Hughes* v. *Macfie* and the sister case (17), but these, it was pointed out by Cockburn, C. J. are at variance with the authorities (18). The learned Judges in the Appellate Court seem to have thought that the Trial Judge would not have arrived at the conclusions at which he did but for the erroneous notion that *Cooke's case* (4) had the effect of overruling the remark of Fry, L. J. in *Stiefsohn* v. *Brookebond Co.* (19), that contributory negligence could be imputed to a child. Though such a remark does occur in the course of the judgment we do not think that his Lordship meant it in the sense in which it was understood by the learned Judges. It has never been doubted in England that as a proposition of law, a child as well as an adult, will be deprived of the remedy for the injury of which it complains if it was contributed to by its negligence, but what would constitute negligence in an adult does not necessarily amount to negligence in a

4. *Cooke* v. *Midland Great Western Railway of Ireland,* (1909) A C 229.

15a. 10 W R 664. 16. 7 C B N S 287. 17. 2 H & C 744.

18. See *Clark* v. *Chambers,* 47 L J Q B 427 at 430.

19. 5 Times L R 684.

child. That was the foundation of the decisions in *Harrold* v. *Watney* (20) and in *Lynch* v. *Nurdin* (21), a case of 1840, and in every other case coming within the rule of attraction or allurement. Neither attraction nor allurement is the foundation of any liability in law, but it is one of the elements which enter into the consideration of what negligence in children is. Lord Denman says :—" Lord Ellenborough's doctrine in *Butterfield* v. *Forrester* was that the defendant could not set up the want of a superior degree of skill or care, as a bar to a claim to redress. Ordinary care must mean that care which may reasonably be expected from a person in the plaintiff's situation, and this would evidently be very small indeed, in so young a child as the plaintiff, between six and seven years of age" (22). Now, in the present case the learned Officiating Chief Justice says :— " Though she was capable of appreciating danger and was old enough to have a sense of circumspection, she did not use it owing to the heedlessness of youth or the burden on her head. The engine was an obvious danger capable of being perceived even by a child of tender years. She must have seen the train standing by the platform without its engine if she had looked in front of her. The fact that the engine had gone towards the east was no guarantee that it would not return along the line she was about to cross " (23). Similar are the observations of Mr. Justice Srinivasa Aiyangar. But this does not conclude the question. The further question is whether consistently with that heedlessness of youth one can reasonably expect a child to reason out the whole process of the various movements of trains arriving and departing from a station yard. The capacity of appreciating danger and the sense of circumspection are not enough. The heedlessness of youth may in spite of these be the dominating factor.

But the plaintiff in our view needed no apology of her youth to entitle her to succeed in the action, nor was it necessary for her to deny her own negligence until knocked down all unawares by the engine, if the defendants could have avoided the consequences of her negligence by keeping a proper look-out when shunting the engine, or by applying the brakes and blowing the whistle when she was actually seen. That is the

20. (1898) 2 Q B 320.
21. 10 L J Q B at 72.
22. *Ibid.*, at p. 75.
23. (1924) 47 M L J 890.

well-known doctrine of contributory negligence laid down in the leading case of *Radley* v. *London and North Western Ry. Company* (24) by Lord Penzance. We do not follow Mr. Justice Coutts Trotter when on the conclusion at which he arrived, namely, that but for the omission to keep a proper look-out and blow a second whistle to attract the attention of the plaintiff the accident would not have occurred, he proceeds to say that had the case been of an adult the Company would have a complete answer in contributory negligence. If, whatever the negligence of the plaintiff, the Company could with proper care on their part have avoided the consequences of that negligence, the plea of contributory negligence, we submit, does not avail, even though the defendant's negligence was anterior to that of the plaintiff. This seems to be the result of the decision in *British Columbia Electric Company* v. *Loach* (25), the facts of which were as follow :—One Hall took Sands with him in a cart, and they drove together on to the level-crossing, and neither heard or saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and no other traffic about. The car approaching the level-crossing at a speed of 35 to 45 miles knocked the cart, horses, and men over and ran some distance beyond the crossing before it could be stopped. When the car was first seen by Hall and probably by Sands who was killed, it was at a distance of 50 yards. He said he could then do nothing, and with a loaded wagon and horses going two or three miles an hour probably he could not. When the driver of the car first saw the cart he was at a distance of 400 ft. and if the brakes which he at once applied had been in proper order, he could have stopped the car within 100 ft. of the cart. The jury found the deceased negligent in not looking to see that the road was clear, and the defendants negligent in the speed at which they drove the car as well as in driving it without proper brakes.

Lord Sumner who delivered the judgment of the Privy Council says :—"Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him, he would have perceived the approach of the car and would have kept out of the mischief. If the matter stopped there his administrator's action must have

24. 1 A C 754. 25. (1916) 1 A C 719.

failed, for he would certainly have been guilty of contributory negligence. .... If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there was nothing he could do. There he was in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes and if they had been effective he could, as the jury found, have pulled up in time........Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done.....What actually killed Sands was the negligence of the Railway Company, and not his own, though it was a close thing (26)." And again his Lordship says :— "If the 'primary' negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the 'ultimate' negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the 'ultimate' negligence which makes the defendant liable ?" (27) On the findings of the Trial Judge it was the omission to keep a proper look-out on the part of the driver or the fireman which was the cause of the accident whereby the plaintiff lost her limbs. Chronologically it began before the plaintiff's negligence and continued right up to the time, when having seen the plaintiff they were not able to bring the engine under control. What actually maimed Jayammal was the negligence of the Railway Company, and not her own, though it was a close thing.

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26. (1916) 1 A C 722, 723.

27. *Ibid.*, p. 725.

CORRESPONDENCE.

To

THE EDITOR,

"MADRAS LAW JOURNAL."

SIR,

Permit me to make a few observations on the note published in your journal in the decision reported in 47 M. L. J. 683.

It is not correct to say that the doctrine of mutuality and the Privy Council decisions bearing on the question were not brought to the notice of the learned Judge. The judgment of the Subordinate Judge which was reversed by the decision in question expressly rested on the point of mutuality and contained a full discussion of all the authorities relevant to the question. The learned Judge felt himself obliged to follow the majority view in the Full Bench case in 42 M. 185 as he understood it and disposed of this question by a bare reference to that decision. As to whether the Full Bench view has been correctly understood and as to whether the decision itself is sound law it is unnecessary to express any opinion in view of the fact that an appeal preferred under clause 15 of the Letters Patent against the judgment of the learned Judge is now pending before the High Court.

Yours sincerely,

N. S. SRINIVASA AIYAR,

Vakil, High Court.